Nos. 82-1248, 82-1278

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ELLEN SCHALL, as Commissioner of the New York City Department of Juvenile Justice,

Appellant,

and

ROBERT ABRAMS, as Attorney General of the State of New York,

Intervenor-Appellant,

—v.—

GREGORY MARTIN, LUIS ROSARIO, KENNETH MORGAN, and all others similarly stated.

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION TO AFFIRM

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES.....	iii
STATEMENT.....	2
1. Ostensible and Actual Legislative Purposes of F.C.A. § 739(a)(ii).....	9
2. Wrongful Detention Under F.C.A. § 739(a)(ii).....	16
3. Lack of Prescribed Standards.....	20
4. Inability to Predict Future Criminal Behavior.	24
5. Inadequacies of Procedural Safeguards....	27
ARGUMENT	
THE JUDGMENT BELOW SHOULD BE AFFIRMED SUMMARILY SINCE, GIVEN THE EXTENSIVE FACTUAL RECORD, UNANIMOUS FINDINGS OF FACTS, AND NARROWNESS OF THE DECISION BELOW, NO SUBSTANTIAL QUESTION WARRANTING PLENARY REVIEW IS PRESENTED IN THIS CASE.....	33
1. The Juveniles' Interests In Pre-trial Liberty Is Substantial.....	33

PAGE

2. The Challenged Statutory Scheme Offends the Due Process Clause of the Fourteenth Amendment..... 37

a. The Statutory Scheme Imposes Punishment Before Trial..... 37

b. The Decision to Detain is Riddled With Subjectivity..... 38

c. The Statute Is Over-inclusive..... 39

CONCLUSION..... 47

TABLE OF AUTHORITIES

CASES	PAGE
Baker v. McCollan, 443 U.S. 137 (1979)	37
Baldasar v. Illinois, 446 U.S. 222 (1980)	45
Bell v. Wolfish, 441 U.S. 520 (1979)	37
Breed v. Jones, 419 U.S. 894 (1975)	34
Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979)	36
Humphrey v. Cady, 405 U.S. 504 (1972)	44
In re Gault, 387 U.S. 1 (1967)	33
In re Winship, 397 U.S. 358 (1970)	34
Ingraham v. Wright, 430 U.S. 651 (1977)	37
McKeiver v. Pennsylvania, 403 U.S. 528 (1971)	34
Papachristou v. City of Jacksonville, 405 U.S. 156 (1972)	39

PAGE

People ex rel. Wayburn v. Schupf, 39 N.Y.2d 682 (1976)..... 32

Powell v. Alabama, 287 U.S. 45 (1932)..... 35

Speiser v. Randall, 357 U.S. 513 (1958)..... 33,37

Suzuki v. Yuen, 617 F.2d 173 (9th Cir. 1980)..... 44

United States v. Edwards, 430 A.2d 1321 (D.C.App. 1981), cert. denied sub nom. Edwards v. United States, 455 U.S. 1022 (1982)..... 6,24,38,42

STATUTES and RULES

D.C. Code 1973, § 23-1331..... 43

D.C. Code 1973, §§ 23-1322(a),(b). 6,43

New York Family Court Act § 739(a)(i)..... 2

New York Family Court Act § 739(a)(ii)..... passim

New York Family Court Act § 753-a..... 17

Supreme Court Rule 16.1(c)..... 1

PAGE

OTHER AUTHORITIES

Lerman, Discussion of 'Differential Selection of Juveniles for Detention,' Journal of Research in Crime and Delinquency 166 (July 1977)..... 42

National Council on Crime and Delinquency, Correction in the United States, 13 Crime and Delinquency 11 (1967)..... 42

Wolfgang, Figlio and Selkin, Delinquency in a Birth Cohort, (1972)..... 41

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MOTION TO AFFIRM

Appellees respectfully move, pursuant to Sup. Ct. Rule 16.1(c) that the Court

summarily affirm the judgment below on the ground that no substantial federal questions requiring further development or oral argument are presented since the judgment, based on affirmed findings of fact after an extensive trial record, is manifestly correct.

STATEMENT

By statute, New York Family Court judges are empowered to detain, without bail, any accused juvenile delinquent found by the judge to be at risk of not returning to court for trial if released. New York Family Court Act (F.C.A.) § 739(a)(i). By a different statute, Family Court judges are also empowered to detain juveniles whenever "there is a serious risk that [the juvenile] may before the return date do an act which if committed

by an adult would constitute a crime." F.C.A. § 739(a)(ii). Only the latter provision is at issue in this case. Although broadly stated this case questions the constitutionality of preventive detention per se, in fact the case may be viewed as considerably narrower in scope.

This suit was filed in 1977 as a class-action writ of habeas corpus. After a bench trial at which extensive evidence was adduced, the district court declared the statute unconstitutional on several grounds. (App. 32a-88a,[1] 513 F.Supp. 691).

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[1]Citations in this form refer to the Appendices to the Jurisdictional Statements filed herein. Additionally, the transcript of the trial in the district court, included in the Joint Appendices filed in the Court of Appeals, will be denoted "T. , Joint App. ".

On appeal, a panel of the Second Circuit unanimously affirmed in an extremely narrow opinion. (App. 1a-22a, 689 F.2d 365). The decision was "strictly limited to the precise issue before" the court. (App. 21a). The panel held "only that pre-trial detention may not be imposed for anti-crime purposes pursuant to a substantively and procedurally unlimited statutory authority when, in all likelihood, most detainees will either not be adjudicated guilty or will not be sentenced to confinement after an adjudication of guilt." Id. The panel expressly intimated "no view as to the Constitutionality of preventive detention in other circumstances." Id.

The procedural history and factual context of this case have been adequately presented in the Jurisdictional Statement

of Appellant Schall and will not be reiterated. However, in view of Intervenor-Appellant's numerous distortions of the record and erroneous statements of fact not found by either the district court or the Court of Appeals, the courts' salient findings relevant to appellees' motion are set forth below.

The Court of Appeals found "facial incongruities" in New York's statutory scheme which "yield a paradoxical result in practice." (App. 7a,8a).

First, the court noted that F.C.A. §739(a)(ii) is not limited to "felonies or violent crimes", but authorizes detention based upon a finding that a juvenile may commit any act between petition and fact-finding "which constitutes a crime under the New York Penal Law"

(App. 7a).[2]

Second, the statute provides no substantive criteria, such as requiring recent, previous convictions for similar offenses, which would serve to guide the Family Court judge, other than the conclusory "serious risk" test. (App. 7a-8a).

Third, the statutory scheme lacks procedural safeguards including any standard of proof, finding of probable cause, or degree of probability of conviction as a condition of ordering detention. (Id.)

The "paradoxical result" identified by the court, is that "the vast majority

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[2]This places New York's statute in sharp contrast to the District of Columbia statute, D.C. Code 1973, §23-1322, which was upheld in United States v. Edwards, 430 A.2d 1321 (D.C. App. 1981), cert. denied sub nom. Edwards v. United States, 455 U.S. 1022 (1982).

of juveniles considered sufficiently dangerous by the Family Court to justify pre-trial incarceration...are in fact released by prosecutors or by the Family Court within days or weeks." (App. 10a).

In his concurring opinion, Judge Newman re-emphasized the narrowness of the Court's decision: "All members of the panel are in agreement that, even if the constitution permits preventive detention of those not yet found to have violated adult penal statutes or juvenile delinquency laws, this New York provision" is nonetheless unconstitutional. (App. 22a-23a). In Judge Newman's view, the statute is unconstitutional because "it permits liberty to be denied, prior to adjudication of guilt, in the exercise of unfettered discretion." (App. 24a).

Judge Newman identified five particular deficiencies in the statutory scheme (App. 27a-28a):

> First, the statute places no limits on the crimes for which the person subject to detention has been arrested...Second, the judge ordering detention is not required to make any evaluation of the degree of likelihood that the person committed the crime of which he is accused... Third, the judge is not required to assess the individual's background ...Fourth, the statute places no limits on the type of crimes that the judge believes the detained juvenile might commit if released ...Fifth, the statute does not specify any standard of proof by which the judge must be persuaded of a serious risk of future crime.

The panel concluded that § 739(a)(ii) is "unconstitutional as to all juveniles." (App. 20a). At the same time, Judge Newman, in his concurring opinion, found the statute unconstitutional, not so much because of the actual numbers of wrongfully detained juveniles, but because the dearth of safeguards "needlessly creates an unnacceptable risk of such results." (App. 24a). These seeming-

ly disparate conclusions actually are complementary, both deriving from the facts adduced at trial as found by the district court.

1. Ostensible and Actual Legislative Purposes of F.C.A. § 739(a)(ii)

The express legislative purpose of § 739(a)(ii), is "crime prevention" (App. 10a, 26a, 63a).[3] It was as a crime prevention or preventive detention statute, therefore, that the statute was evaluated and found defective by the courts below.

The Court of Appeals stressed that in making § 739(a)(ii) determinations, unlike ultimate dispositional orders, Family

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[3] Intervenor-Appellant disingenuously implies that humanitarian concern for the juvenile is one of the purposes as well. (Juris. Statement at 22). Intervenor-Appellant ignores the testimony of his own witness, Judge Cesar Quinones, as relied upon and quoted extensively by the Court of Appeals (App. 11a-12a).

Court judges "emphasize matters going solely to the protection of the community." (App. 11a). The Court relied upon undisputed testimony by Intervenor-Appellant's witness, Family Court Judge Cesar Quinones (App. 11a, n.24):

> I believe that the purpose of 739(a)(ii) is really protection of the community. I believe that's the basic purpose for that provision.

The unanimous conclusion of the Court of Appeals constituted an affirmance of the finding of the district court that (App. 63a):

> This provision [§739(a)(ii)] seems to lack the high-minded purpose of protecting the juvenile which is the objective generally cited to justify deviations from adult standards in the juvenile justice system. Rather, the purpose seems to be to protect society from the juvenile.

Contrary to Intervenor-Appellant's contention (Jurisdictional Statement, at 17, 19), the Court of Appeals did not reach the issue of whether this asserted community protection purpose might be constitutionally permissible in other circumstances.[4] Such a broad-

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[4]In fact, far from approving community protection as a permissible purpose, Judge Newman, in his concurring opinion stated,

> It is arguable that, with respect to those accused of crime, pretrial detention imposed solely for the purposes of preventing the commission of future crimes prior to trial is punishment. With respect to those convicted of crime, the imposition of added confinement, beyond the penalties for the specific offense, is nonetheless punishment despite the prospective purpose of preventing future harm. [Citation omitted]. The extension of that principle to those accused of crimes raises the broad issue of whether pretrial detention to prevent future crime is ever permissible, an issue that need not be faced in deciding this case. For purposes of this appeal, I am willing to assume that (footnote continued)

based determination was unnecessary because of the court's conclusion that, in actuality, "739(a)(ii) is utilized principally, not for preventive purposes, but to impose punishment for unadjudicated criminal acts." (App. 17a).

The panel's conclusion that §739(a)(ii) remands are in actuality imposed as punishment derived from its findings that: (1) a large number of juveniles were detained despite evidence so "weak or insufficient" that they were ultimately never adjudicated; (2) many juveniles detained were mistakenly deemed to be dangerous in the "summary hearing" held under § 739(a)(ii) but upon adjudication were released to the community; and (3) many juveniles detained were released upon

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(footnote continued)
pretrial detention ordered for the purpose of preventing future crime serves a regulatory purpose. (App. 23a, n.1)[Emphasis in original].

disposition by the Family Court because "the time served, including the preventive detention period, is frequently considered sufficient punishment." (App. 13a, 17a-18a). The court found no compelling interest to justify detention as to any of these groups and held as to the latter (App. 18a):

> [D]etention serves the purpose of punishment rather than crime prevention, since early release -within days or at most a few weeks - by a Family Court Judge contradicts any asserted need for pretrial confinement to protect the community.

Moreover, the lack of procedural safeguards to ensure that detention would not be imposed improperly or beyond that which would be necessary to satisfy its ostensible crime prevention purpose further demonstrates the actual punitive nature of the statute (App. 19a):

> Section 739(a)(ii) thus incarcerates punishes - large numbers of persons upon a standard of proof which is constitutionally invalid and which cannot be justified in the name of crime prevention.

Finally, the record clearly shows that pretrial detention under § 739(a)(ii) can be seriously harmful to juveniles:

> Juveniles detained under 739(a)(ii) may be held in a secure facility and exposed to assault and criminal subcultures.

(App. 13a-14a)[Footnote omitted]. The court relied upon the testimony of Judge Quinones:

> In my opinion, all defenses [sic: detentions], juvenile or adult, can have bad effects. For one thing, we are talking about youngsters of tender age. You are taking them away from their family. I mean, that's bound to have a psychological ...detrimental effect on them.
>
> * * *
>
> Then again juvenile center, as much as we might try, is not the most pleasant place in the world. If you put them in detention, you

> are liable to be exposing these youngsters to all sorts of things. They are liable to be exposed to assault, they are liable to be exposed to sexual assaults. You are taking the risk of putting them together with a youngster that might be much worse then they possibly might be and it might have a bad effect in that respect.

(App. 12a, n.24; 14a, n.29)[citations omitted.].

Likewise, the district court found that detention "stigmatizes the youthful detainee in a way that associates him with criminal behavior." (App. 84a). The court held (App. 83a):

> The burdens of pretrial detention are substantial to impose on a presumptively innocent man, even where there is probable cause to believe he has committed a crime. [Citation omitted]. To allow a state to impose these burdens on a juvenile before the state has taken the initial validating step of establishing its right to restrict the individual's liberty, in order to ensure his presence at trial, would seem to be at war with accept-

ed concepts of due process of law.[5]

2. Wrongful Detention Under F.C.A. §739(a)(ii)

Construing the evidence adduced at trial most favorably to Appellant and Intervenor-Appellant, the Court of Appeals found that (App. 9a):

> [O]ne critical fact has been established--the vast majority of juveniles detained under §739(a)(ii) either have their petitions dismissed before an adjudication of delinquency or are released after adjudication.

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[5] The "burdens of pretrial incarceration were spelled out quite clearly at trial, particularly in the testimony of Dr. Lynwood, David Zinn and Steven Hiltz, Esq. These inc lude: prejudice in the trial process, an increase in the chance that the child will be placed away from home, psychological and emotional damage, problems with schooling, exposure to violence, and alienation from family. (T. 31-34, 36, 96-9, 236, 256-7, 260, 396-9, 401-3, 480; Joint App. 209-212, 214, 255-8, 331-2, 348-9, 352, 482-5, 487-9, 566).

The court relied upon a study prepared by the Vera Institute of Justice which established two patterns: (a) of detained juveniles, "49% have their cases dismissed before trial, 21% are dismissed or released after trial, and only 30% are restrictively placed";[6] and (b) the pretrial detention rate (one third of all delinquency petitions) is far higher than the restrictive placement rate (11% of all petitions).[7]

Additionally, the Court of Appeals noted similar trends among the thirty-four case histories presented by appellees

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[6]Contrary to Intervenor-Appellant's contention, the court clearly used the term "restrictively placed" as the term is commonly understood, not in the highly technical sense to include only "designated felony" placements under F.C.A. §753-a.

[7]It should be noted that the record below also included data from the New York State Division for Youth to like effect. (Joint App. 1311, 1321, 1130, 1338).

through exhibits and testimony at trial.[8] These case histories concerned only youths detained under § 739(a)(ii) and were found by the district court to reveal "arbitrary and capricious action in its crudest and rawest form". (App. 79a). [Emphasis

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[8] Intervenor-Appellant's summary of this evidence as it related to the named plaintiffs and those who testified at trial was replete with errors, hearsay, and facts not found by the courts below. Without burdening this Court with a refutation of each of these mistatements at this time, a few examples will suffice. The record does not indicate Juan Santiago had a "dagger"; nor did it "establish" that he had committed similar, previously unreported crimes (Joint App. 939-940, 943). The statement regarding Kenneth Morgan was simply third degree hearsay, not reliable evidence. (Joint App. 791). Far from establishing the prosecutor's reasons for terminating Luis Rosario's case, the record is completely silent. Moreover, Intervenor-Appellant's assertion as to the extent of prior record of Rosario and Morgan was incorrect. (Joint App. 792; Petition's Exhibits 2,3).

supplied]. While the sample is concededly too small for precise statistical conclusions to be drawn, the same generalized trends emerged as described above. The representativeness of these case histories was never challenged by appellants (App. 10a, n.19) and, in fact, undisputed testimony by Steven Hiltz established that the cases were quite typical (T. 24, Joint App. 202).

Although appellants continue to dispute the conclusions drawn from this data, the Court of Appeals noted (App. 9a):

> Although the defendants have superior access to generalized statistics and at least an equal opportunity to present a counter-sample of case studies, they chose to rely solely upon the most vulnerable data in the record.

3. Lack of Prescribed Standards

The high number of wrongful detentions noted above derives in large measure from the lack of uniform criteria for rendering determinations under § 739(a)(ii). All juveniles arrested may be considered for detention, regardless of the offense with which they are charged and regardless of their prior record, even if they have never before been arrested.

All three members of the panel and the district court found that the procedurally and substantively unlimited terms of the statute provide unfettered discretion to the Family Court judge to order pretrial detention. (App. 7a-8a, 18a, 20a, 21a, 24a, 27a, 28a, 29a, 53a, 54a, 65a, 66a, 67a, 79a).

The Court of Appeals held that Family Court judges generally consider

certain factors ostensibly related to crime prevention. (App. 11a). Contrary to the assertions of both appellants, beyond these broad considerations, there are no specific uniform criteria considered by all Family Court judges in deciding whether or not to order detention.[9]

As the district court found (App. 54a):

> No uniform court or judicial criteria, yardstick or guidelines govern a §739 disposition. In deciding whether the juveniles should be detained,

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[9]Neither Judge Quinones nor Judge Driscoll, the two judges testifying on behalf of Intervenor-Appellant, testified that the various criteria that they use in rendering detention determinations are identical to those utilized by other judges in their jurisdictions. Both limited their testimony to the factors they themselves consider. (T. 463, 465, 485, 657-60, 679-80; Joint App. 549, 551, 571, 718-21, 740-41). According to Judge Quinones: "I guess we all have our standards and we all have measures of determining in our own minds the seriousness of the allegations." (T. 465, Joint App. 551).

> each judge must rely on his own subjective judgment, based on the limited information available to him at court intake and whatever personal standards he himself has developed in exercising his discretionary authority under the statute. (T. 435-513).

Examples of the result of such "unbridled discretion" (App. 29a, 66a) can be seen in some of the district court's unanimously affirmed findings (App. 67a):

> It is clear that the judge decides on pretrial detention for a variety of reasons--as a means of protecting the community, as the policy of the judge to remand (Exhibit 6a, p.3), as an express punitive device (Exhibit 42, p.11), or because of the serious nature of the charge. (Tr. 465. Exhibit 13a, p. 3), among others.

Further, the court found (App. 79a):

> Whether the juvenile was a first offender with no prior conduct, whether the court was advised that the juvenile was an obedient son or was needed at home, whether probation intake recommended

> parole, the case histories in this record disclose that it was not unusual for the court to discount these considerations and order remand based on a 5 to 15 minute evaluation.

See also App. 80-81a.

Finally, the trial court identified the category of detainees (including 16 of the 34 case histories) against whom application of F.C.A. §739(a)(ii) was most "pernicious" -i.e., detainees who had been released by police upon arrest to their parents or guardians, who had been allowed to stay home for "roughly five days to over a month prior to the §739 hearing" and who had committed no infractions during that period (App. 61, 79a-80a). The court noted as well numerous examples of remands for extremely minor crimes and for first offenders (App. 55a, 61a) -- youths who clearly would not have been detainable

under the District of Columbia statute at issue in U.S. Edwards, supra.

4. Inability to Predict Future Criminal Behavior

The ability of Family Court judges "correctly" to detain youths under § 739(a)(ii), in terms of meeting the purported goals of the statute, are impaired, not merely by the lack of uniform standards, but also by the primitive state of the art of crime prediction.

The inability to predict future criminal behavior has been well-documented and is well supported by the record and by the findings of the trial court (App. 68a-77a). As Judge Newman stated:

> The hazards of predicting human behavior are well known. They are not diminished when the issue is whether a person arrested for one crime will, in the interval prior to his trial, commit another crime. (App. 25a).

The district court relied upon the finding of appellees' expert, criminologist Leslie Wilkins, that:

> [H]e would be surprised if recommendations based on intake interviews were better than chance and assessed the judge's subjective prognosis about the probability of future crime as only 4% better than chance -virtually wholly unpredictable. (App. 68a).

Professor Wilkins observed that the shorter the period of risk -- in this case, the interval during which the child would be paroled pending trial --the more difficult and arbitrary the prediction (T. 332; Joint App. 408):

> [A]s [the base] rate drops, the likelihood, for example, of a person who has committed a violent crime, committing another violent crime in a given interval of time that probability really begins to get very, very small. So as you subdivide the groups or as you truncate time, so the percentage in the category you are looking for diminishes until you get to the proverbial needle in the haystack which not even statisticians can find.

Thus, the ability to predict crime commission during the period at risk in this case -- that is, a period of only a few days to five weeks (T. 462-463) -- is extremely small and is, in fact, no better than simply abstracting from the base rate (T. 343). In cases where there have not been any prior convictions, the probability of crime commission within such a short interval "would normally be extremely small indeed." (T. 344).[10] As the district court noted (App. 68a):

> He [Prof. Wilkins] testified that no method had yet been devised which could predict with any acceptable degree of accuracy that a juvenile shall commit a crime,

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[10] Intervenor-Appellant's assertion that Professor Wilkins established the peak rate of post-conviction recidivism to be approximately three months after release is patently false. Professor Wilkins testified that the rate of recidivism peaks somewhere between three and six or nine months after release (T. 332, Joint App. 418). (Emphasis supplied.)

particularly the commission of an offense in a short space of time, as the judge must do in making his § 739 decision.

For these reasons, the trial court concluded that appellees are deprived of pre-trial liberty based on "judgments that are untrustworthy and uninformed and without the requisite rationality which due process mandates." (App. 77a).

5. Inadequacies of Procedural Safeguards

The enormous risk of error in judicial determinations under § 739(a)(ii) is in no way mitigated by existing safeguards. There is no requirement that the state meet a prescribed burden of proof; nor is there any requirement to show a substantial probability of eventual conviction. Even probable cause to arrest need not be shown to detain preventively.

The hearing held under F.C.A. § 739 lasts only five to fifteen minutes, in practice, (App. 68a) and is quite perfunctory -- hardly the exhaustive inquiry implied by Intervenor-Appellant. As the Court of Appeals found, on the basis of the testimony of Judge Quinones, no testimony is typically taken from witnesses as to likelihood of guilt. Family Court judges simply have before them a petition, normally accompanied by an affidavit of accuracy, a recommendation by a probation representative who had not personally made the inquiries and statements by the child, his attorney and accompanying parent or other adult. (App. 10a-11a). The district court's findings that "often there is no one present with personal knowledge of what happened", that "no inquiry is made into the non-

hearsay allegations of the truth of the charges, and no testimony is taken under oath" are undisputed. (App. 53a, 54a).[11]

As the district court found, the probation recommendation relied upon by the Family Court is derived from a ten to forty minute interview conducted by an assigned probation officer. The child is not represented by counsel and "not subjected to any professional psychiatric or psychological examination unless mental health problems are patently evident." (App. 51a). The probation

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[11]Judge Quinones' testimony directly contradicts Intervenor-Appellant's statement that oral statements may be taken from complainants in lieu of affidavits:

> I don't see how that would happen, because if you had their presence, you would have the person sign the petition itself. I don't see how that would happen.

(T. 447, Joint App. 533).

officer "is not equipped to make any sophisticated or in depth evaluations of the charges or the child, particularly in light of time constraints." (App. 67a). In fact,

> There do not appear to be any governing criteria which must be followed by the probation officer in choosing between proposing detention and parole, nor do psychological or psychiatric factors appear to be considerations involved in the probation officers' recommendations. (App. 52a).

Moreover, counsel typically is assigned to the child just as the hearing begins. Thus, "he takes on responsibility for the proceedings only moments before convincing reasons must be presented to the court for not ordering pretrial detention." (App. 68a).

Finally, contrary to appellants' contentions, the statutory requirement that a statement of facts and reasons

accompany judicial determinations under Family Court Act § 739(a) does not overcome the lack of procedural and substantive protections described above. As the Court of Appeals found (App. 20a),

> Individual litigation ... is a practical impossibility because the periods of detention are so short that the litigation is mooted before the merits are determined.

Likewise, the district court held that, although the Family Court judge "usually gives some indication on the record of his reasons for ordering pretrial detention," and although a stenographic record is made of the proceeding, "the judge is accorded total and unbridled discretion since effective review is not possible"

[citation omitted]. (App. 53a, 66a).[12]

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[12]The district court recognized that individual writs of habeas corpus are authorized, as in the case of People ex rel. Wayburn v. Schupf, 39 N.Y.2d 682 (1976) cited by Intervenor-Appellant. However, the court found:

> The short span of pretrial detention makes effective review impossible. Detention is over before appellate review can be obtained. In New York ex rel. Wayburn v. Schupf and in this case, motions to dismiss on grounds of mootness were denied because to hold otherwise would have meant insulating § 739 from constitutional challenge. Nonetheless, in reality no juvenile ordered into pretrial detention can test the validity of his adjudication while he is being held in custody pursuant thereto.

(App. 66a, n. 29). [Emphasis supplied].

ARGUMENT

THE JUDGMENT BELOW SHOULD BE AFFIRMED SUMMARILY SINCE, GIVEN THE EXTENSIVE FACTUAL RECORD, UNANIMOUS FINDINGS OF FACTS, AND NARROWNESS OF THE DECISION BELOW, NO SUBSTANTIAL QUESTION WARRANTING PLENARY REVIEW IS PRESENTED IN THIS CASE.

1. The Juvenile's Interest In Pre-trial Liberty Is Substantial

The interest of appellees' class in their liberty is of "transcending value." Speiser v. Randall, 357 U.S. 513, 525 (1958). The most egregious form of deprivation of liberty is incarceration. Pretrial detention additionally, and unavoidably, deprives the detainee of other fundamental interests, including interference with preparation of charges for trial.

This Court has frequently recognized the significant interests juveniles possess to remain free from unlawful or wrongful deprivations of liberty. See In re Gault,

387 U.S. 1, 50 (1967); In re Winship, 397 U.S. 358 (1970); Breed v. Jones, 419 U.S. 894 (1975). The record in this case conclusively demonstrates that there are no special benefits to juveniles in detention to justify an otherwise questionable process. Cf. McKeiver v. Pensylvania, 403 U.S. 528 (1971). Perhaps best summarized by appellants' witness at trial, Commissioner Kelly, there are "detrimental consequences to institutionalization to most people and kids are no different." (T. 571; Joint App. 646).

The decision to detain before trial is an important one in any criminal justice system. The time between arraignment and trial has been recognized to be "perhaps the most critical period of the proceedings ... when consultation, thoroughgoing investigation and preparation ....

[are] vitally important." Powell v. Alabama, 287 U.S. 45, 57 (1932). Wrongful detention of juveniles is even worse than wrongful detention of adults, as this record demonstrates. Incarceration has the potential to traumatize children or to teach them the ways of crime. It can cause difficulties with school. It also increases the likelihood that the accused will be convicted. Finally, it increases the prospect that, once convicted, the juvenile will be sentenced to a restrictive placement.

For these reasons, and aware that "[l]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action," Greenholtz v. Inmates of the Nebraska Penal and Corectional Complex,

442 U.S. 1, 18 (1979) (Powell, J., concurring in part and dissenting in part), the panel below correctly required a compelling state interest to justify detaining appellees before trial. As the panel said (App. 16a):

> We believe all would agree, however, that any exception to the general rule that incarceration follow, rather than precede, adjudications of guilt can be justified, if at all, by a compelling governmental interest.

Based on the record at trial, the panel was unable to identify a sufficient governmental interest in detention since the overwhelming majority of those detained were released from custody (1) without being found guilty, (2) after a short period of detention, or (3) because they were detained, being regarded as having served time in confinement.

2. The Challenged Statutory Scheme Offends Due Process Clause of the Fourteenth Amendment.

a. The Statutory Scheme Imposes Punishment Before Trial.

Punishment before trial is antithetical to American constitutional law. It is a truism that in the United States every criminal justice system includes a "trial which the United States Constitution guarantees to any accused before he may be punished." Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979). Whether punishment inflicted by the state occurs in the criminal context or in any other context:

> [T]he state does not acquire the power to punish...until after it has acquired a formal adjudication of guilt in accordance with due process of law.

Ingraham v. Wright, 430 U.S. 651, 671-72 n.40 (1977). See also Bell v. Wolfish, 441 U.S. 520, 535 (1979); Speiser v. Randall, 357 U.S. at 525-26.

The special reasons the Court of Appeals found the statutory scheme to be unconstitutional are explained by the broad reach of the statute. The vast majority of juveniles detained under the statute are released within a short time because most never should have been detained in the first place. It is simply far too easy to be detained under the statute. These flaws in the scheme require affirmance of the judgment below without deciding whether a more tightly written and applied preventive detention law -- such as that reviewed in United States v. Edwards, supra -- may survive constitutional attack.

b. The Decision to Detain is Riddled With Subjectivity

There are no uniform standards for the decision to detain. As the record shows, one judge's "policy" is to detain

preventively all juveniles arrested and charged with possession of a weapon (Joint App. 821) The decision is based on the recommendation of a probation officer, after an interview which lasts from 10 to 40 minutes. The court appearance itself usually lasts five to fifteen minutes and, as the trial court found, the decision is made "for a variety of reasons -as a means of protecting the community, as the policy of the judge..., as an expressly punitive decree, or because of the serious nature of the charge." (App. 67) This undue degree of discretion accorded to Family Court judges offends due process of law. See Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).

c. The Statute is Overinclusive

Section 739(a)(ii) is overinclusive because it allows the incarceration of

persons under sixteen based on a prediction that, if released, they would commit any act equivalent to a crime, including shoplifting, joy riding or graffitti. As the record below demonstrates, many juveniles are detained preventively who have been accused of nothing more than a property crime, such as "stealing a pair of shorts" (Joint App. 883) or playing "three-card monte" (Joint App. 989).

Not only may juveniles accused of petty offenses be detained preventively in New York, they need never have been found guilty of any past wrongdoing. See Findings of the District Court, App. 60a-61a, 81a-82a. An important empirical study of juveniles indicates that a first offense, even a serious one, is predictive of neither the probability of, nor the seriousness of, future offenses over the

course of lifetime. Wolfgang, Figlio and Sellin, Delinquency in a Birth Cohort, 159-61 (1972). The study further found that the probability that a youth whose first offense involved personal injury would subsequently be arrested for another injury offense was less than ten per cent. Id. at 188.

Given the ease with which a juvenile may be detained under the challenged statute, it is no wonder that most are released from custody within a short time after they are found to be a serious risk to the community. Their detentions were arbitrary, capricious and wholly needless. The state's own evidence at trial showed that:

> (t)he great majority of the approximately 6000 juveniles who pass through the City's detention facilities each year return directly to the community on leaving detention.

Most of these are not placed under probation supervision.[13]

[State's Exhibit A (for identification), at 9-10.]

New York's scheme stands in sharp contrast to the preventive detention law challenged in United States v. Edwards, supra. First, under it, persons may be

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[13]This practice is apparently common in juvenile justice. A noted sociologist has observed that "the modern American strategy for correcting juveniles tends to rely on an emergent policy. The unstated policy is: offer more juvenile detention jailing than any other correctional response." Lerman, Discussion of 'Differential Selection of Juveniles for Detention,' Journal of Research in Crime and Delinquency 166, 168 (July 1977). Similarly, the National Counsel on Crime and Delinquency has declared: "Juvenile detention is frequently misused as an immediate punishment for delinquent acts. If punishment is the Court's only disposition, it ought to be administered only after the facts are in -- not as an immediate reaction to the charge." National Counsel on Crime and Delinquency, Correction in the United States, 13 Crime and Delinquency 11 (1967).

detained only if charged with a limited number of "crime(s) of violence." D.C. Code 1973, §23-1331(4). Second, the accused must have been convicted of a crime of violence within the ten-year period immediately preceding the alleged crime of violence for which he is presently charged, or the crime of violence was allegedly committed while the accused was, with respect to another crime of violence, on bail or other release pending completion of a sentence. § 23-1322(a)(2). Third, detention may not be ordered unless there is (1) "clear and convincing" evidence that the accused is eligible for detention, (2) no condition of release will "reasonably assure" the safety of the community, and (3) a "substantial probability" that the accused is guilty of the offense. §§23-1322(a)(1,2), 1322(b).

In this case, undisputed evidence reveals that of those juveniles detained pre-trial in 1979, more than half (51%) were charged with offenses which would preclude entirely their eligibility for detention under the District of Columbia standard. [Supplement to Brief for Petitioners-Appellees in Court of Appeals (Table V)]. Without deciding whether crime prevention may occasionally justify pre-trial detention, it is clear that the state's interest in preventing petty offenses "is [not] great enough to justify such a massive curtailment of liberty." Humphrey v. Cady, 405 U.S. 504, 509 (1972). See also Suzuki v. Yuen, 617 F.2d 173 (9th Cir. 1980). Protection of property is not so compelling a state interest to justify deprivation of liberty

before trial.[14]

New York's lack of proportionality and perspective, both with regard to the seriousness of the offense[15] and the prior record of the accused, largely explains the high number of juveniles who are ultimately released from detention. The state's purpose in detention is met once the juvenile has been detained for a short time. Rather than the purpose being protection of the community how-

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[14]An additional problem with the statute's reach to include misdemeanors and other non-violent crimes is Justice Powell's observation in Baldasar v. Illinois, 446 U.S. 222, 231 (1980): "No court can predict with confidence whether a misdemeanor defendant is likely to become a recidivist."

[15]The Vera study introduced at trial indicates that 33% of those charged with B misdemeanors, 24% of those charged with A misdemeanors and 41% of those charged with the lowest felony charge in New York -- E felonies -- are detained before trial. (J. App. 1265)

ever, it becomes, as the panel and the district court convincingly found, punishment. This offends basic notions of fairness and serves no legitimate state purpose.

The narrow holding of the panel "that pre-trial detention may not be imposed for anti-crime purposes...when, in all likelihood, most detainees will either not be adjudicated guilty or will not be sentenced to confinement after an adjudication of guilt" (App. 21a) is manifestly correct and should be affirmed summarily.

CONCLUSION

FOR THE FOREGOING REASONS, THE JUDGMENT BELOW SHOULD BE AFFIRMED.

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Respectfully submitted,

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